No. 8847

United States Circuit Court of Appeals

For the Ninth Circuit

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLANT

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STATEMENT AS TO JURISDICTION.

This is an appeal from the final order, judgment and decree of the United States District Court for the Southern District of California, Central Division, dismissing with prejudice the plaintiff-appellant's* amended bill of complaint for infringement of her common law copyright in her play entitled "Dancing Destiny".

*The parties will be designated appellant and appellee throughout this brief.

There is diversity of citizenship since, as the bill of complaint alleges, appellant is a citizen of the United States and a resident of the City of Los Angeles, County of Los Angeles, and State of California (Par. I), and appellee is a corporation organized and existing under and by virtue of the laws of the State of New York, having a regularly established place of business in the City of Los Angeles, County of Los Angeles, and State of California, and in the Central Division of the United States District Court for the Southern District of California (Par. II) (Tr. 4-5).

This is a suit of a civil nature in equity for infringement of common law copyright, between citizens of different states, wherein the matter in controversy exceeds, exclusive of interest and costs the sum or value of Three Thousand Dollars ($3,000.00) (Bill of Complaint, Par. III, Tr. 5).

The bill of complaint also alleges that appellant, prior to January 1, 1934, created, originated, invented and wrote a new and novel play entitled "Dancing Destiny" (Bill of Complaint, Par. IV, Tr. 5); that said play was written as an original and independent undertaking by appellant, the author thereof, and contains a large amount of matter wholly original with appellant, and constitutes copyrightable subject matter, according to the common law of copyright (Bill of Complaint, Par. V, Tr. 5); that since writing said play appellant has maintained the same in unpublished form and as a result thereof there was secured to her under the common law of copyright, the right as author and proprietor of an unpublished work to prevent the copying, publishing or use of such unpub-

lished work without her consent (Bill of Complaint, Par. VII, Tr. 5-6); the delivery of the manuscript of appellant's play to appellee pursuant to negotiations, the first rejection thereof by appellee and the return thereof to appellant, a second submission of the manuscript to appellee pursuant to appellee's request and a second rejection thereof by appellee (Bill of Complaint, Par. VII, Tr. 6); the appellee's knowledge of appellant's authorship and proprietorship of the play "Dancing Destiny", her copyright title thereto, and that for motion picture purposes said literary property and dramatic play under the common law of copyright belonged to and was possessed by appellant (Bill of Complaint, Par. VIII, Tr. 6), and the manufacture of the motion picture entitled "Stowaway" by appellee notwithstanding the foregoing facts (Bill of Complaint, Par. IX, Tr. 6-7).

The charge of infringement is contained in Paragraphs X, XI and XII of the bill of complaint (Tr. 7-8).

PROPER JURISDICTION ALLEGED AND SHOWN.

The District Courts of the United States have original jurisdiction of suits in equity arising under the common law of copyright as between citizens of different states, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

United States Constitution, Article 3, Section 2, Clause 1;

Judicial Code, Sec. 24; U. S. C. title 28, Sec. 41.

An appeal may be allowed by a judge of the District Court or of the Circuit Court of Appeals.

Judicial Code, Sec. 132; U. S. C. title 28, Sec. 228.

The Circuit Courts of Appeals have appellate jurisdiction to review by appeal or writ of error final decisions:

> "First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

Judicial Code, Sec. 128; U. S. C. title 28, Sec. 225.

The appellant's petition for appeal from the final order, judgment and decree of the court below was allowed by the District Court on May 2, 1938 (Tr. 27-29) and the bond thereon was approved (Tr. 33-35). The citation on appeal (Tr. 2) thereafter issued and was filed in this court on May 24, 1938, as a part of the record.

STATEMENT OF THE CASE.

This appeal (assignment of errors 3 and 4) (Tr. 30-31) raises the question of whether appellee, in the manufacture and distribution of its motion picture "Stowaway", copied appellant's play "Dancing Destiny" and thereby infringed her common law copyright therein.

If it be found that appellee copied appellant's play "Dancing Destiny" and thereby infringed her common law copyright therein, then it must follow that the amended bill of complaint states facts sufficient to constitute a valid cause of action for infringement of common law copyright; that the decree of dismissal with prejudice is

contrary to law and the facts stated in the amended bill of complaint; that appellant has been damaged by the deliberate copying and plagiarism of her play by appellee in the manufacture and public distribution of its motion picture, and that appellant should have been granted the relief prayed for in the bill of complaint, as set forth in assignment of errors 1, 2, 5, 6 and 7 (Tr. 30 and 32).

The appeal (assignment of errors 8) also raises the question of whether the District Court erred in failing to make findings of fact and conclusions of law herein in accordance with Equity Rule 70½.

SPECIFICATION OF ERRORS TO BE RELIED ON.

The appellant here relies upon the following assignment of errors, grouped for the purposes of argument in the manner indicated:

A—3a, b, c and d and 4. (Tr. 30-31).

B—8. (Tr. 31).

ARGUMENT.

A.

ASSIGNMENT OF ERRORS.

3. That the District Court erred in failing to order, adjudge and decree, upon comparing plaintiff's play entitled "Dancing Destiny" and defendant's motion picture entitled "Stowaway", that:

   (a) Said motion picture photoplay "Stowaway" was a deliberate piracy and infringement of plaintiff's play "Dancing Destiny".

   (b) That defendant illegally, unlawfully, wilfully and deliberately copied plaintiff's play "Dancing Destiny".

   (c) That defendant in manufacturing its motion picture photoplay "Stowaway" had copied and made use of the technique, dramatic situations and/or episodes, dramatic plot, treatment, embellishment, and detail of plaintiff's play "Dancing Destiny".

   (d) That the defendant had copied and made use of the same series of events and episodes with the conscious intention and purpose to excite by presentation and representation in the motion picture "Stowaway" the same emotions in the same sequence with the same casual relation as plaintiff had invented and created in her play "Dancing Destiny".

4. That the District Court erred in dismissing said amended bill of complaint for the reason that it appears from the facts set forth in said amended bill of complaint and the exhibits attached thereto, that the defendant's motion picture photoplay "Stowaway" is an infringement of the plaintiff's play entitled "Dancing Destiny".

The question of copying and infringement, raised by the foregoing assignment of errors, will be discussed under the following headings:

A(1) The effect of appellee's motion to dismiss.

A(2) Originality of appellant's play admitted.

A(3) Access by appellee to appellant's play admitted.

A(4) A comparison of the appellant's play and appellee's motion picture.

A(5) The test of copying in cases of this kind.

A(6) The degree of copying in the present case.

A(7) Whole work need not be copied to support charge of infringement.

A (1) The effect of appellee's motion to dismiss.

The bill of complaint in the above-entitled cause alleges that appellant prior to January 1, 1934, created, originated, invented and wrote a new and novel play entitled "Dancing Destiny"; that the said play was an original independent undertaking by appellant and contains a large amount of matter wholly original with her as the author thereof; that the same constitutes copyrightable subject matter, according to the common law of copyrights; that since writing the play appellant has maintained the same in unpublished form and as a result thereof there was secured to her under the common law of copyright the right as author and proprietor of an unpublished work to prevent the copying, publishing or use of such unpublished work without her consent; that appellant caused a manuscript of her play entitled "Dancing Destiny" to be delivered to appellee; that said appellee rejected said manuscript; that at the request of the appellee the appellant again submitted the manuscript of the play to appellant and that said manuscript was again rejected (Paragraphs 4 to 7, inclusive, Tr. 5-6).

The bill of complaint then charges the appellee with the manufacture of a picture entitled "Stowaway", alleged to

be a deliberate piracy and infringement of appellant's play; that in the making of same the appellee copied appellant's play; that appellee copied and made use of the same technique, dramatic situations and/or episodes, dramatic plot and its treatment, embellishment and detail; and further that appellee copied and made use of the same series of events and episodes with a conscious intention and purpose to excite by presentation and representation in its picture entitled "Stowaway" the same emotions in the same sequence with the same casual relation as appellant created in her play "Dancing Destiny". (Paragraphs 9 and 10, Tr. 6-7). Then follows the allegations that appellant had not at any time granted to appellee any right, license or privilege to produce her play or to make any dramatization of any character whatsoever in picture form of said play.

Prior to the filing of appellee's motion to dismiss the parties herein stipulated (Tr. 21) that the bill of complaint be amended by filing a copy of plaintiff's play entitled "Dancing Destiny" and a release print of defendant's motion picture entitled "Stowaway" with the provision that both should be deemed to be annexed to said bill of complaint as schedules thereto and incorporated therein with the same force and effect as though originally included therein as integral parts thereof.*

Thereafter, by stipulation (Tr. 22) the parties agreed to proceed by way of motion to dismiss as a means of bring-

*The appellant's play "Dancing Destiny" and the release print of appellee's motion picture entitled "Stowaway" were transmitted to this Court as original exhibits pursuant to a stipulation of the parties (Tr. 36) and an order of the Court below (Tr. 37).

ing the cause on for hearing, the said motion to be based and to be considered upon the amended bill of complaint, unaffected by any admission, denial or allegation contained in the answer (Tr. 12-20) theretofore filed by defendant. The motion to dismiss (Tr. 23-24) was filed on September 15, 1937.

It is elementary that on a motion to dismiss, the allegations of material facts which are well pleaded in the bill are accepted as true for the purposes of the motion. See

Kansas v. Colorado, 185 U. S. 126; 46 L. Ed. 838; 22 S. Ct. 552;

Arizona v. California, 283 U. S. 423, 463; 75 L. Ed. 1154, 1170; 51 S. Ct. 522;

Simkins Federal Practice, Rev. Ed., Section 648.

Thus the only question raised by the motion was that of infringement, involving a comparison of appellant's play and appellee's motion picture.

A (2) Originality of appellant's play admitted.

In view of the accepted rule there can be no serious question that the effect of the filing of the motion to dismiss constituted an admission upon the part of appellee that appellant's play was and is original. Certain it is that the appellee is debarred from offering any evidence to the contrary. Had it been appellee's desire to question the originality of appellant's play it should not have proceeded by way of motion to dismiss but should have relied upon Paragraph 2 (Tr. 12) and Paragraph 6 (Tr. 15-18) of its answer and proofs properly adduced thereunder.

A motion to dismiss in a copyright case admits originality for the purpose of the motion, just as in a patent

case a motion to dismiss admits the validity of the patent in suit. See

Caesar v. Jos. Pernick Co. Inc., 1 Fed. Supp. 290.

A (3) Access by appellee to appellant's play admitted.

The bill of complaint alleges (Par. VII, Tr. 6) that on two separate occasions, prior to the making of appellee's motion picture entitled "Stowaway" appellant submitted her play "Dancing Destiny" to appellee for consideration and that the same was thereafter twice rejected.

The effect of the motion to dismiss is to admit the truth of these facts and thereby establish appellee's access to appellant's play, leaving only the question of infringement to be determined. Cf. *Caesar v. Jos. Pernick Co., Inc.*, supra. In other words, appellee having filed a motion to dismiss must be deemed to have waived any other defenses it may have in preference to a test of the case on the naked question of infringement. As heretofore stated, this involves merely a comparison of the works.

A (4) A comparison of the appellant's play and appellee's motion picture.

Comparison of appellee's motion picture play with appellant's play leads to the inescapable conclusion that there has been infringement. In both picture and play the locale of the opening of the story is a Chinese village and the principal character is a little girl. In the play the child is "Desiree", daughter of a young American missionary whose wife is a character in the play; in the picture she is "Barbara", an orphan under the guardianship of a relative (Alfred Kruikshank). Her parents had been killed while on duty at a post in China. In both

picture and play the child speaks or learns to speak Chinese fluently and is or soon becomes familiar with the customs. In both picture and play the child has a close friend and admirer in a Chinese gentleman of considerable station. In the picture it is Sun Low, the village magistrate, while in the play it is Li Ling Chi, a wealthy Chinese merchant, and in each instance this character is or has been an intimate friend of the child's parents.

In both picture and play the locale of the story shifts from the village to a seaport. In the former the child is sent to Shanghai on a boat by her Chinese friend, accompanied by a male servant, to stay with the magistrate's brother, in fear of an impending bandit raid on the village. In the play the child and her parents leave on a trip to Hong Kong by boat, as the guests of, and accompanied by, the Chinese merchant and his small daughter, the playmate of the principal character.

In the picture the child is deserted by the Chinese servant who makes off with the money while en route to Shanghai. In the play the party is captured by Chinese bandits. All, including the principal character's parents, are killed save the two children. The children hide on a riverboat and eventually make their way to Hong Kong. It is significant that the parallel developments of picture and play bring about a situation in which the principal character, **an orphan**, is on a boat approaching a Chinese seaport, without adult friends.

In the picture, upon reaching Shanghai, the principal character meets Tommy Randall, a young American **bachelor**, in a Chinese store and through her knowledge of Chinese aids him in making a purchase. She hides in his car

which is taken aboard a **steamer,** and eventually comes under Randall's care. In the play the child comes under the influence of Winston Hathaway, a young English **bachelor,** while on a river boat approaching Hong Kong. Following a misunderstanding with two friends, one a young American bachelor, the other, Ruth Stevens, a young English woman of whom he is enamored, Hathaway takes passage on a **steamer** bound for England, accompanied by the principal character, having theretofore announced his intention of so doing to the American Consul.

In both play and picture the young bachelors meet American friends in the seaports and in each instance the child and her present and future care are discussed.

The action of the picture continues on shipboard, bound for Bangkok. The child, regarded as a stowaway, brings about a meeting between Randall and Susan, a young American girl. Randall's English **butler,** Atkins, takes a prominent part in the care and entertainment of the child. Susan is on her way to Bangkok to marry a young American. He is accompanied by her fiance's mother. The boat reaches Hong Kong. Susan's fiance, in response to his mother's cable flies there. There are incidents ashore at Hong Kong. When once more aboard ship the captain advises Randall of receipt of wire from the American Consul that child will be taken into his care and placed in orphanage. To forestall this Randall persuades Susan to marry him so they can adopt the child. This they do, planning to institute divorce proceedings upon arriving in the United States, their purpose in temporarily taking care of the orphaned child having been accomplished. The scene

shifts to a courtroom in Reno. The child takes the stand as a witness in the divorce action and it is through her testimony the divorce is denied and an agreeable "**reconciliation**" is effected.

In the play, the scene shifts from Hong Kong to England. Hathaway takes the child to the home of his parents, who are estranged. The child wins the affection of the parents, and, through their mutual admiration of her, they are **reconciled.** Reconciliation is also effected between Hathaway and Ruth Stevens, with whom the misunderstanding had been had in Hong Kong, through the action of the child and the young American friend who has come on from Hong Kong. The Hathaways also have a **butler,** Hawkins, who becomes attached to the child and unbends to join her childish pranks. An American relative of the child, upon being deceived, relinquishes all claim to guardianship and urges Hathaway's adoption of her.

The lowest common denominator of play and picture is a little girl in a small Chinese village, befriended by a Chinese gentleman of station; her journey from an inland village by riverboat to a Chinese seaport; her being left alone en route by similar calamities; her being thrust into the care of a young bachelor through these circumstances, her attachment for the bachelor as her natural guardian, an ocean voyage; her attachment for a butler employed by the bachelor or his family, and the fact that she unwittingly brings about a love affair between the young bachelor and a third party.

It is believed that the foregoing analytical comparison of play and picture indicates that in the making of the picture appellee copied appellant's story. There being

originality in appellant's play and appellee having had access thereto, as admitted by the motion to dismiss, it is not singular that there are so many similarities as to characters, dramatic situations, episodes, technique, dramatic plot and modification of characters and we submit this leads to the inescapable conclusion that the appellant's play has been copied and her common law copyright therein infringed.

A (5) The test of copying in cases of this kind.

The test of copying, in a case calling for comparison of a motion picture with a play or story, has been clearly and succinctly set forth by this Court in *Harold Lloyd Corporation v. Witwer,* 65 Fed.(2d) 1, in which, at page 18, it was said:

> "The question really involved in such comparison is to ascertain the effect of the alleged infringing play upon the public, that is, upon the average reasonable man. **If an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis by others.** The reaction of the public to the matter should be spontaneous and immediate." (Emphasis supplied).

Another test, quoted with approval by this Court in *Harold Lloyd Corporation v. Witwer,* supra, is that given in 13 C. J. 1113, Section 276 Note 30 (quoting from *White-Smith Music Pub. Co. v. Apollo Co.,* 209 U. S. 17, 28 S. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628):

> "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original."

It is submitted that the "average reasonable man", upon reading appellant's play and seeing appellee's picture, would detect the fact that the former had served, in a substantial degree, as a source of the material in the latter, and that there had been literary piracy.

A (6) The degree of copying in the present case.

Appellant does not contend that her entire story was appropriated in the making of appellee's motion picture. On the contrary it is appellant's contention that a material and critical portion of her work was used. Appellant concedes that it is a rare thing to find infringement which is 100% complete. The authorities take a similar view for it was said in *Dam v. Kirk LaShelle Co.* (C. C. A. 2) 175 Fed. 902, 41 L. R. A. (N. S. 1002, 20 Ann. Cas. 1173):

> "It is impossible to make a play out of a story—to represent a narrative by dialog and action—without making changes, * * *."

Appellant contends that in making its motion picture "Stowaway" appellee copied the characterizations, technique, dramatic situations, episodes, dramatic plot and treatment, embellishment and detail or series of events which occur in her story. We have seen that the underlying theme of play and picture runs a parallel course through a substantial and critical portion of the two works and while a fork in the road is reached that fact is not surprising nor decisive. On the contrary, where the characterizations as a whole achieve results as analogous as they do here, slight differences in endings may be attributable to a desire upon the part of the infringer to avoid identity (cf. *Dam v. Kirk LaShelle Co.,* supra).

A (7) Whole work need not be copied to support charge of infringement.

Appellant has heretofore pointed out that appellee has not taken the whole of her story but she contends that a material and critical portion thereof was appropriated. It is well settled law that such partial appropriation will constitute infringement. A leading case, and appellant's principal authority is *Sheldon et al. v. Metro-Goldwyn-Pictures Corp. et al.*, 81 F.(2d) 49 (C. C. A. 2nd).

This was a suit to enjoin defendants' picture play as an infringement of plaintiffs' copyrighted play. Plaintiffs' title was conceded. So too was validity. Infringement was the only question.

The facts were, briefly, these: the defendants had seen a play written by plaintiffs based on a cause celebre in Scotland, and were anxious to secure the rights to make a motion picture. The Will Hay's organization objected on the grounds of obscenity. This objection was not overcome and plaintiffs' manuscript was returned.

Subsequently, a novel written by an English woman, based on the same **cause celebre**, was suggested to defendants and they purchased the rights to it. Defendants assigned the preparation of a play therefrom to an author in its employ, having in mind a certain actress. This author, and those selected to assist him, had seen and read plaintiffs' play. They denied they had used plaintiffs' play in any way whatever, and agreed they had used the original incident of the cause celebre and the novel purchased by defendants from the English woman.

To meet these denials the plaintiffs appealed to the substantial identity between passages in the picture and those parts of the play which were original with them.

The court made these observations in comparing the picture and the play:

> "Coming to the parallelism of incident, the threat scene is carried out with almost exactly the same sequence of event and actuation; it has no prototype in either story or novel. Neither Ekebou nor L'Angelier went to his fatal interview to break up the new betrothal; he was beguiled by the pretence of a renewed affection. Moreno and Renaul each goes to his sweetheart's home to detach her from her new love; when he is there, she appeals to his better side, unsuccessfully; she abuses him, he returns the abuse and commands her to come to his rooms; she pretends to agree, expecting to finish with him one way or another. True, the assault is deferred in the picture from this scene to the next, but it is the same dramatic trick. Again, the poison in each case is found at home, and the girl talks with her betrothed just after the villain has left and again pledges him her faith. Surely the sequence of these details is pro tanto the very web of the author's dramatic expression; and copying them is not "fair use".

The court held there had been infringement, reversing the decree of the trial court and ordered an injunction, damages and an accounting as prayed. Speaking through Judge Learned Hand, it said:

> "We must therefore state in detail those similarities which seem to us to pass the limits of 'fair use'. Finally, in concluding as we do that the defendants used the play pro tanto, we need not charge their witnesses with perjury. With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions;

memory and fancy merge even in adults. Yet unconscious plagiarism is actionable quite as much as deliberate. Buck v. Jewell-La Salle Realty Co., 283 U. S. 191, 198, 51 S. Ct. 610, 75 L. Ed. 971, 76 A. L. R. 1266; Harold Lloyd Corporation v. Witwer, 65 F.(2d) 1, 16 (C. C. A. 9); Fred Fisher, Inc. v. Dillingham (D. C.) 298 F. 145."

* * * * * * *

"**We have often decided that a play may be pirated without using the dialogue.** Daly v. Palmer, Fed. Cas. No. 3,552, 6 Blatch. 256; Daly v. Webster, 56 F. 483, 486, 487; Dam. v. Kirke La Shelle Co., 175 F. 902, 907, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1173; Chappell & Co. v. Fields, 210 F. 864; Dymow v. Bolton, 11 F. (2d) 690; and Nichols v. Universal Pictures Corporation, supra, 45 F.(2d) 119, do not suggest otherwise. **Were it not so, there could be no piracy of a pantomime, where there cannot be any dialogue; yet nobody would deny to pantomime the name of drama.** Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell."

* * * * * * *

"The play is the sequence of the confluence of all these means; bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning. That as it appears to us is exactly what the defendants have done here; the dramatic significance of the scenes we have recited is the same, almost to the letter. **True,**

> **much of the picture owes nothing to the play; some of it is plainly drawn from the novel; but that is entirely immaterial; it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate.** We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue." (Emphasis supplied).

A "structural grouping of incidents", if new, is infringed by a parallel grouping of incidents. See *Lowenfels v. Nathan, et al.* (S. D. N. Y. 1932), 2 F. Supp. 73, 80, wherein it was said:

> "What was protected by the plaintiff's copyright was only that which was original to him, i.e., the grouping of incidents in such manner that his work presented a new conception or a novel arrangement of events * * *."

In *Nichols v. Universal Pictures Corp.,* 45 F.(2d) 119, Judge Learned Hand had this to say:

> "It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, * * * when plays are concerned, the plagiarist may excise a separate scene (citing cases); or he may appropriate part of the dialogue (citing cases)."
>
> * * * * * * * *
>
> "But we do not doubt that two plays may correspond in plot closely enough for infringement."

See *Daly v. Palmer,* Fed. Cas. 3,552, 6 Fed. Cas. 1133, 1136 (S. D. N. Y. 1868) holding a single scene (here a

railroad incident) may be the subject matter of valid copyright and infringed where that in which the whole merit of the scene consists was incorporated in another work without material alteration in the constituent parts of the series of events, or in the sequence of the events in the series.

See also:

Chappell & Co., Ltd., et al. v. Fields, et al., 210 F. 864 (C. C. A. 2nd 1914);

Weil, Copyright Law, Sec. 187.

In

Dam v. Kirk LaShelle Co., (C. C. A. 2) 175 Fed. 902, 41 L. R. A. (N. S. 1002, 20 Ann. Cas. 1173),

the court recognized the obligation to protect one who prepared the framework of a play, saying:

> "The story was but a framework * * *but the right given to an author to dramatize his work includes the right to adopt it for presentation upon the stage which must necessarily involve changes, additions, and omissions. It is impossible to make a play out of a story—to represent a narrative by dialogue and action—without making changes, and a playwright who appropriates the theme (plot) of another's story cannot, in our opinion, escape the charge of infringement by adding to or slightly varying his incidents."

In the present case, we submit, there has been that degree of copying which the authorities recognize as infringement of copyright.

B.

ASSIGNMENT OF ERRORS.

8. That the District Court erred in failing to make findings of fact and conclusions of law herein in accordance with Equity Rule 70½.

The court below entered a decree of dismissal with prejudice (Tr. 25-26) following the hearing on the motion to dismiss. This was a final, appealable order. Despite this fact, findings of fact and conclusions of law were not made in accordance with Equity Rule 70½. Consequently, neither the appellate Court nor the parties hereto have any means of ascertaining upon what the District Court based its dismissal of the bill of complaint.

In *Louisville & N. R. Co. v. U. S.*, 10 F. Supp. 185 (D. C. N. D. Ill. E. D. (1934)), the court took the position that the requirements of the rule are mandatory and findings of fact and conclusions of law must be made though the record consists only of pleadings, certain exhibits attached to the complaint and on affidavit by defendant, no evidence having been offered by either side. Cf. *Parker v. St. Sure*, 53 F.(2d) 706 (C. C. A. 9) from which it may be inferred that findings in some form are required by rule 70½.

CONCLUSION.

In summary, appellant contends that the bill of complaint, as amended by annexation of the exhibits, does state a valid cause of action and infringement of her common law copyright is thereby shown. It was error, therefore, for the District Court to dismiss the bill of

complaint. Likewise it was error for the trial Court to ignore Equity Rule 70½ and the requirement therein by failing to make findings of fact and conclusions of law.

Appellant submits that the record shows that she is the author of an original story in which she has common law rights; that, for the purposes of the motion to dismiss, these facts and likewise appellee's access thereto, are to be deemed admitted; that a comparison of the motion picture and the play lead to the conclusion appellee without consent or license copied portions of the play and produced a picture embodying, in a substantial degree, the same dramatic situations, plot, treatment, embellishment and detail and characters, and thereby infringed appellant's common law copyright.

Wherefore, it is respectfully prayed that the judgment of the District Court should be reversed in order that justice may be done in the premises.

Dated, San Francisco, California,

June 21, 1938.

Respectfully submitted,

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